THE JOURNAL

OF

POLITICAL ECONOMY

VOLUME 20 *MAY—1912* NUMBER 5

RAILWAY DISCRIMINATION

The main purpose of the original Interstate Commerce act, and of the various measures that have been passed to amend it, has been the suppression of unfair railway discrimination. The most pernicious form such discrimination formerly took was that of secret rebating. It is popularly believed, because secret rebating has been almost extirpated, that the suppression of unfair discrimination has become secondary in importance to the prevention of excessive rates. This belief is, to a large extent, unfounded. Its prevalence makes needful emphasizing of the facts that unfair discrimination continues, that it still produces baneful results, and that its suppression and prevention still are, or ought to be, the main object of government regulation of railway traffic. I would not be misunderstood as saying or implying that the condition in respect to railway discrimination is as bad as in years past. On the contrary, there has been a very marked improvement since the Hepburn act went into effect in 1906. There never was a time in the history of American railways when there was so little unfair discrimination as there is now. But existing conditions fall short of being what they ought to be. There still are many evil forms of discrimination; and what is worse, many of them under existing laws cannot be stopped or prevented by either the railways or the Interstate Commerce Commission.

The railways cannot stop or prevent many of them, because to do so their managers would have to make arrangements which

almost certainly would be held illegal; and even if such arrangements were legalized, a minority of the managers might in some instances not agree to them; yet any arrangement by railways to prevent discrimination, to be effective, must be made by all competing lines. The Commission cannot stop or prevent many of these discriminations, because it has not been given so much power over discriminations as experience has shown it must have if it is to exercise any control over them with uniform equity and effectiveness. The Commission said in its annual report for 1910, "The fight against discrimination is by no means won." If the main purpose of past legislation on this subject is to be accomplished, there must be more legislation regarding it.

Existing forms of unfair discrimination may, for the purposes of this discussion, be divided into two classes. To the first class belong those which are in effect, if not legally, rebating. The Interstate Commerce Commission has authority to suppress them by the issuance of orders for their cessation and by causing prosecutions for them; but the desired result would in many cases be sooner and more surely accomplished if certain changes were made in existing laws affecting railway agreements and discriminations. The second class consists of unfair adjustments in the rates of competing shippers or communities. These are in many cases the result of excessive railway competition, and take such forms that no fair order can, under the law as it stands, be issued in respect to them by the Interstate Commerce Commission.

I shall not attempt to describe the various forms of unfair discrimination which savor of, or actually amount to, rebating, but shall refer merely to one most important species of the genus. Many large industrial corporations directly or indirectly own switching, or industrial, railways. The Bureau of Statistics and Accounts of the Interstate Commerce Commission,[1] in 1910, made an extensive investigation into the operating and financial conditions of industrial railways. In its annual report for that year the Commission said:

> Of the 2,410 industrial railways covered by the investigation referred to, it was found that, on June 30, 1909, 202 had suspended operations; 1,395

[1] *Twenty-fourth Annual Report of the Interstate Commerce Commission*, 1910, p. 33.

derived no revenue whatever from operations, that is to say, these were purely transportation agencies to the manufacturing or mining operations concerned; 364 derived revenue from local rates or from contributions by the controlling industries, and 449 derived revenue from divisions of through rates or allowances by carriers with which they had physical connection or some sort of an understanding. It is this last-named class that is of especial significance to the Commission when it is recognized how easily discriminations may be practiced by carriers through the agency of industrial railways which connect them with large shippers.

In the same report (p. 10) the Commission, after making a remark already quoted—that "the fight against discrimination is by no means won"—said:

Those practices still remaining are more insidious and more difficult of extirpation than open rebating, by reason of the fact that they are hidden in contractual arrangements entirely legal except for the effect produced. To speak generally, these arrangements depend for their vice upon some unification of shipper and carrier, by which shippers secure an interest in carriers' profits. Certain divisions with terminal railroads, payments for the use of plant facilities, payments to shippers for performing for themselves services not incumbent upon the carrier, arrangements with private lines, and the ownership of industrial corporations by carrier corporations and of carrier corporations by industrial corporations, are the more prominent and baneful examples of the abuses now continuing.

The way in which switching railways are often used to secure unfair discriminations for the industrial corporations that control them is indicated by the statements of the Commission. The situation will be made clearer by two simple illustrations. Suppose that an industrial railway is constructed by a mining or manufacturing company to take the place of teams and trucks which have been used to haul its products to the nearest railway station or team-track, and that it is built because the company by means of a switching line can transport its goods to the trunk-line railways more cheaply than by the use of horses and wagons. It is clear in that case that the railways should not pay either the industrial concern or the industrial railway for this switching service, any more than it should pay the industrial concern for teaming its goods to the station. Yet, in many cases where two or more railways compete for the traffic of an industrial corporation owning an industrial railway, the practice has been adopted by

the trunk lines of paying for the service rendered to the industrial concern by its own railway in switching its own goods. This gives an industrial concern owning a switching line an obvious and unfair advantage over a rival concern which does not own a switching railway, but teams its goods to and from its plant.

Again, the railways have an arrangement among themselves under which each of them pays the others "per diem" for the use of cars belonging to the others—"foreign cars"—while on its lines. Because of the short hauls on, and the consequent small revenue received by, switching lines belonging to the railways themselves, such as the Terminal Railroad Association of St. Louis, and the relatively long time cars are on their tracks for loading and unloading, these switching railways are allowed an arbitrary "per diem" reclaim of three, four, or five days. In other words, at the season of the year when the per-diem rate per car is 30 cents, the switching railway is allowed a reclaim for each car run upon its track of, say, five days or $1.50. This cannot lead to unfair discrimination where the switching railway is owned by the railways themselves, and is not, directly or indirectly, controlled by, or connected with, an industrial concern. In some cases, however, per-diem reclaims for as much as five days are paid to industrial railways for cars which do not stay upon their tracks for an average of more than one or two days. When the car stays on the industrial railway's track only one day, and the industrial railway gets a reclaim of five days, it pays the trunk line railway 30 cents for the use of the car, and the trunk-line gives the industrial railway a reclaim of $1.50, of which four-fifths, it would seem, is nothing more nor less than a rebate to the concern that owns the industrial railway.

One of the most important cases involving the relations between trunk lines and industrial railways ever heard by the Interstate Commerce Commission is that of *Manufacturers' Railway Co. of St. Louis* v. *St. Louis, Iron Mountain & Southern Railway Co., et al.* The Manufacturers' Railway is owned by exactly the same interests that control the Anheuser-Busch Brewing Company. The question of what arrangement regarding rates the trunk-lines railways may make with it is now before the Interstate Commerce

Commission for the second time. The railways long paid the Manufacturers' Railway for delivering to them the shipments of the Anheuser-Busch Brewing Company and the few other industries located on the tracks of the Manufacturers' Railway. They understood from certain observations and decisions of the Commission that the payment of switching rates to the Manufacturers' Railway was not regarded favorably by the Commission, and withdrew them. Subsequently, believing that later decisions of the Commission were of a different tenor, and under the stress of competition, they renewed the arrangement. It was following this that the Commission began a thorough investigation of the matter. The first hearing before the Commission was very perfunctory. Representatives of the railways did not appear to testify, the reason being, it is believed, that they feared that any roads that put witnesses on the stand would lose business. At the second hearing in St. Louis in January, 1912, Milton H. Smith, president of the Louisville & Nashville, was a witness, and in the course of his testimony made some remarkable statements. I quote as follows from Mr. Smith's testimony:

Any allowance to the Anheuser-Busch Company through the Manufacturers' Railway, whereby the rail lines transport property shipped to or shipped by the brewing company at a less rate than the current tariff rates, is an unjust, illegal, and criminal reduction in the rates, prohibited by the Act to Regulate Commerce. . . . .To illustrate, during the month of October, 1911, ... [ten] cars of beer were shipped by the Anheuser-Busch Company via the Louisville & Nashville to Memphis, Tenn.; . . . . average weight per car 24,475 pounds; through rate 16 cents per 100 pounds; total revenue $391.60, of which $4.50 per car, or $45, was rebated to the Anheuser-Busch Brewing Company through the Manufacturers' Railway Company for alleged services in delivering the loaded cars to the tracks of the Wiggins Ferry Company. It will be seen, therefore, that the rebate amounted to about 11.5 per cent of the total revenue, for which the brewing company moved the cars over its main line, a distance of something less than 4,000 feet; while the Louisville & Nashville assumed the cost of moving the traffic between the point of interchange with the Wiggins Ferry and Memphis, 447 miles, including the crossing of the Mississippi River at St. Louis, the Ohio River at Evansville, the Cumberland at Clarksville, Tenn., the Tennessee River at Danville, Tenn., and also furnished the terminal facilities at Memphis. The property was moved in refrigerator cars, for which the Louisville & Nashville paid the owners $\frac{3}{4}$ of a cent per mile going and returning, or $7.16. . . . .

Under an arrangement between the Manufacturers' Railway and numerous connecting railways whereby the Manufacturers' is practically made a party, so far as these roads can do so, to the per-diem rules agreement, had the shipments been moved in refrigerator cars not belonging to private lines, or, say, in refrigerator cars of the Louisville & Nashville or Illinois Central, some benefit would have been derived by the owners of the Manufacturers' Railway, growing out of the fact that it is allowed what is designated as six days' reclaim. That is, at this season of the year the per-diem charge on such cars would have been 35 cents per day; and should an L. & N. refrigerator car have been delivered to the Manufacturers' Railway and loaded and returned the same day, it would have received as six days' reclaim $2.10. The Louisville & Nashville is not at present a party to this arrangement.

Another concession made to the Anheuser-Busch Brewing Association through the Manufacturers' Railway is the issue of passes to the officers of that company, including August A. Busch, chairman of the board; G. F. Moore, president and general manager; Adolphus Busch, vice-president; R. Huehlberg, traffic manager, and their families, and including in some instances transportation for private car, for what is known as pass for car and party. Such issue of passes does not seem to be authorized by the Act to Regulate Commerce. It is supposedly done under the provision of section one of the act, reading as follows: "Provided, that this provision shall not be construed to probihit the interchange of passes for the officers, agents, and employees of common carriers and their families." There cannot be an interchange of passes between the various steam carriers, extending from the Atlantic to the Pacific, and the Manufacturers' Railway.

On cross-examination Mr. Smith bluntly said that the Louisville & Nashville was in the same category with the other railways involved, and added:

There are numerous other industries besides the Anheuser-Busch Brewing Association in and around St. Louis, as well as other parts of the country, that have constructed and maintain tracks and operate them and are entitled to the same concessions that may be allowed the Manufacturers' Railway. . . . .

If the conditions that now exist are to continue you will breed industrial railways or railways of a similar character as you might breed rabbits. There are probably a dozen in and around St. Louis with their mouths open and their teeth sharpened to receive similar concessions.

Being asked why the Louisville & Nashville had entered into arrangements which he considered criminal, he answered: "As I have already explained, there is a division of duties, and the traffic officials assumed the responsibility, and they did it because of the

big stick, the boycott, and in my opinion they acted unwisely and also illegally." What Mr. Smith meant was that all railways which did not give to the Manufacturers' Railway the same concessions that were being given to it by any one railway would have the traffic of the Anheuser-Busch Brewing Association withdrawn from them. George F. Moore, president of the Manufacturers' Railway Company, while previously testifying at the same hearing, had been asked: "Could any line hope to obtain business which you controlled as against a competitor which would pay you $4.50 a car more than the other line would pay?" and had replied, "The line that paid the allowance would get the business if there was not any hope for reparation." Mr. Moore's statement seems to justify Mr. Smith's explanation of the arrangement made with the Manufacturers' Railway by the various trunk lines.

This case is exceptional only in the extent to which publicity has been given to the facts about it. A somewhat similar situation is described by the Interstate Commerce Commission in its report 1694, *In the Matter of Division of Joint Rates on Coal to Points in North Carolina.* It was shown in this proceeding that the Durham & South Carolina Railroad was owned by the Williams & McKeithan Lumber Company and that the Durham & Southern was owned by the same interests that controlled the American Tobacco Company. It was also shown that on shipments of coal from the New River district to Durham, North Carolina, the division of rates and the mileages that the coal was hauled over different roads were as follows: Chesapeake & Ohio, 221 miles, 81 cents; Norfolk & Western, 116 miles, 77 cents; Durham & South Carolina, 1 mile, 62 cents.

The Interstate Commerce Commission said in its report:

> The Durham & South Carolina, being owned by a corporation which owns the main industry on that line, cannot receive an allowance such as that here given without its being in effect a rebate on the traffic of the allied industry which moves over the Norfolk & Western for or to the Durham & South Carolina.

The Commission also ascertained that the Durham & Southern had a remarkable traffic agreement with the Seaboard Air Line, under which the latter surrendered the position of terminal carrier

on Durham traffic, both in and out, to the Durham & Southern, which for its twenty-mile haul received 40 per cent of the Seaboard's division of the rate on through business via the Virginia gateway, and it said:

> If there is a dollar over and above the actual cost of transportation in the 40 per cent division which the Durham & Southern gets, it goes into the pockets of the Dukes; it is not a rebate given to the American Tobacco Company, but confessedly is an advantage growing out of the relations between the Dukes and the tobacco interests, for if the Dukes did not have freight to route, the traffic manager of the Seaboard says that no such arrangement would have been made.

The Commission said in conclusion:

> There may be some doubt as to the power of the Commission to correct a situation such as this, but whatever power the Commission has it should exercise. An order will be issued against the Seaboard Air Line citing it to show cause why its rates into and out of Durham on all classes and commodities should not be reduced, and against the Norfolk & Western that it show cause why its rate on coal into Durham should not be reduced.

These illustrations doubtless will suffice to show the nature of the discriminations in favor of large industrial concerns that are effected by improper relations between railways owned by them and the trunk-line railways. The Commission's expression of doubt as to its ability to deal with them, while based on good ground, would have been even more applicable to the second class of discriminations I have mentioned—those effected by adjustments of rates which do not savor at all of rebating, but may accomplish the same result. In order to see why the Commission's power to deal with rates is inadequate, let us consider the authority to stop and prevent such discriminations in rates as it possesses.

The Commission now has two very important kinds of authority over rates: (1) When it finds rates already in effect excessive or unfairly discriminatory it may reduce them, and fix maximum reasonable rates. This power it was given by the Hepburn act of 1906. (2) It may suspend for a maximum period of ten months proposed advances in rates, while it is investigating their reasonableness; and if it finds them unreasonable, may prohibit them. This power was conferred by the Mann-Elkins act of 1910.

The provision of the Hepburn bill giving the Commission the authority first mentioned is in substance as follows:

> Whenever, after full hearing, the Commission shall be of the opinion that any rates are unjust, or unreasonable, or unjustly discriminatory, the Commission is hereby authorized to determine and prescribe what will be just and reasonable rates as the *maximum* to be charged and to make an order that the carrier shall cease to collect any rate *in excess of the maximum rate so prescribed.*[1]

This gives the Commission authority, when it finds an adjustment of rates unjustly discriminatory, to reduce only such of them as it may consider too high. It cannot raise any that it may think too low.

The provision of the Mann-Elkins bill authorizing the Commission to suspend changes and prevent advances in rates is in substance as follows:

> Whenever there shall be filed with the Commission any new individual or joint rate, the Commission is hereby given authority, upon reasonable notice, to enter upon a hearing concerning the propriety of such rate. Pending such a hearing and the decision thereon, the Commission, upon filing and delivering to the carriers affected a statement in writing of its reasons for such suspension, may suspend the operation of such rate, but not for a longer period than one hundred and twenty days beyond the time when such rate would otherwise go into effect; and after full hearing, whether completed before or after the rate goes into effect, the Commission may make such order in reference to such rate *as would be proper in a proceeding initiated after the rate had become effective.*[2] Provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, the Commission may extend the time of suspension for a further period not exceeding six months.[3]

As the only action the Commission can take in reference to a rate after it has become effective is to reduce it by fixing a lower maximum rate, it has been assumed that this last quoted provision authorizes it to deal only with advances. In one case,[4] however, the Commission held that "it has the power to suspend

[1] Sec. 15.

[2] The italics in all the citations are mine.

[3] *Loc. cit.*

[4] *In the Matter of the Request for Suspension of Reduced Rates on Packing-House Products and Fresh Meats from Fort Worth, Texas, to Mississippi River Crossings and Points East Thereof.* Opinion 1571, decided June 2, 1911.

reductions in rates in any case where such suspension will operate to prevent an apparent discrimination."

It is also contended by some lawyers that when, under the revised fourth section of the Interstate Commerce act, the Commission authorizes a carrier to charge a lower rate for a longer than for a shorter haul, it may fix the minimum below which the rate for the longer haul may not be reduced. The fourth section says that

upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carriers may be relieved from the operation of this section.

It is argued that this, together with other provisions of the law, not only authorizes the Commission to fix the maximum reasonable rate that may be charged for the shorter haul, but also the minimum reasonable rate that may be accepted for the longer haul. But other lawyers argue that the courts must hold that any authority that the law does not clearly give to the Commission is not given at all, and that as the power to fix a minimum rate is not expressly conferred, it must be decided that it has been withheld.

This latter view the Interstate Commerce Commission itself has adopted. In its annual report for 1911,[1] in discussing the cases arising in the western inter-mountain territory under the amended fourth, or long-and-short-haul, section of the act—its decisions in which were overruled by the Commerce Court—it says:

The Commerce Court intimates that the mistake of the Commission is in having attempted to fix a relation of rates instead of establishing reasonable rates; but, as we have already pointed out, there is no way in which the discrimination found to exist in these tariffs can be prevented except by fixing a differential, *since we have no power to establish an absolute rate or fix a minimum charge below which the carrier is not free to go.*

There never has been any question in the minds of those thoroughly familiar with the law that, except possibly in the

[1] P. 38.

fourth section, it does not give the Commission power in any circumstances to fix a minimum or absolute rate; and the Commission's ruling that it has no power to fix such a rate, even under the fourth section, shows that under the statute as it stands the Commission will not try to exercise any such power in any case unless, indeed, the Supreme Court of the United States shall interpret the fourth section differently from the way in which the Commission interprets it. Even if the Supreme Court should hold that under the fourth section the Commission may fix a minimum rate for the longer haul where it allows a lower rate to be charged for a longer than for a shorter haul, by no possible interpretation could it be held that the law authorizes the Commission to fix minimum or absolute rates in any case where the long-and-short-haul principle is not involved. The only final order it can issue under other provisions of the law to prevent any change in rates is "such an order in reference to such rate . . . . as would be proper in a proceeding initiated after the rate . . . . had become effective"; and the only order it can make in reference to any rate after it has become effective is one substituting for it a reasonable maximum rate.

These limitations on the Commission's power are not a merely theoretical evil. This will appear from consideration of some of the motives and forces that influence railways in making rates, and some of the concrete results.

The traffic manager long has been the target for harsh criticism. He has been portrayed as an autocrat who has used his power of making rates to build up some communities and tear down others, to make the rich shipper richer and the poor shipper poorer, and to determine arbitrarily in what markets the producer shall sell, and from what centers of production the consumers of each community shall draw their supplies. This picture is too highly colored. It is inaccurate in essential details. The traffic manager is a sales manager. He does what other sales managers do—gets as wide a market and as good prices for his wares as he can. He has to fix rates on numerous commodities. He has to deal with many communities, large and small, and with many shippers, large and small. He has to meet the competition of numerous

rivals. He has been, and is, subjected to heavy, incessant pressure both by the large communities—through their commercial organizations—and by the big shippers, for rates lower in proportion than those given to other communities and shippers—pressure of the same sort that we have already seen has been used to get for industrial railways excessive switching rates or excessive divisions of through rates. The weapon that has been most often and successfully used by communities and shippers to get unfair advantages has been the giving of increased traffic to roads that would yield to their solicitations, and the withdrawal of traffic from those that would not. Often commercial organizations have threatened boycotts against railways that were not sufficiently tractable. Sometimes they have maintained boycotts for considerable periods. Similar action by big shippers is common. This is attacking the traffic manager in his most vulnerable point. He is paid to get business, and such incidents weaken him with his management no matter how he explains them.

In every territory there are several competing railways. In every considerable number of men there are sure to be some who are unwise or unfair. Now, it has happened many times that a big corporation or community has demanded some concession in rates which the management of every railway concerned but one has regarded as unfair and has opposed, but which that one has granted. When such a concession has been made by one road it must be made by all competing roads on pain of losing competitive business. Consequently, that there are many unfair rates and arrangements does not show that railway managers as a class are either unwise or unfair, but merely that the unwise or unfair among them, aided by economic conditions—and, as I hope to show later, by the existing statutes—have been able to put and keep in effect unfair rates, in spite of the opposition of the large majority of traffic managers.

Suppose a great industrial corporation not only has a large amount of traffic to give, but is controlled by men who are also dominant in one or more of a group of competing trunk-line railways. The federal and state governments claim, and exercise, the power to limit railway profits. They do not have any such author-

ity over industrial concerns. Men who are influential in both a large industrial concern and a railway, therefore, may have an incentive to cause the railway to make extremely low rates on the commodities shipped by their industrial concern, and may do it over the opposition of the officers of all the railways concerned. Now, recently there has been a rapid integration of the control of industrial and railway corporations. Men who are largely interested in industrial concerns are also potent in the counsels and financial affairs of a number of railways, and, whether owing to this or other causes, there is a pernicious tendency to make rates that are disproportionately low on commodities produced and shipped by big industrial corporations.

The danger involved in this tendency of those controlling large industrial corporations to get control of some railways was clearly recognized and pointed out by Commissioner (now Chairman) Charles A. Prouty of the Interstate Commerce Commission in testifying before the Committee on Interstate Commerce of the United States Senate seven years ago. The following is an extract from Mr. Prouty's testimony:[1]

Senator Newlands: What do you regard the greatest evil in connection with transportation—this question of rebates or this question of discrimination under the published tariff as between localities?

Mr. Prouty: In the past the rebates have been the most serious question. My own opinion is that in the future the discriminations in the tariff itself will be the most serious question. Go into New England today, and you will find that the tariff puts absolutely into the possession of the Standard Oil Company every foot of the territory of the New York, New Haven & Hartford Railroad. You will find that class of discrimination all through this country. I think in the future that class of discrimination will probably be more serious than the question of rebates. That is really not a discrimination against localities. That is discrimination as between shippers. That is the adjustment of a tariff in such a way as to prefer one shipper to another.

Senator Newlands: Do you think there is any great danger from the fact that men who are largely interested in these great industrial corporations control certain railway lines?

Mr. Prouty: I do regard that as the very gravest danger.

An illuminating illustration of unfair discrimination in rates which benefits certain large interests is afforded by the existing

[1] *Hearings on the Regulation of Railway Rates before the Committee on Interstate Commerce of the United States Senate*, 1905, pp. 2912–13.

rates on dressed meats between cities on the Missouri River and Chicago. It is a principle recognized by traffic managers, economists, commissions, and courts, that usually the rate should be higher on finished products than on raw materials, because (1) ordinarily the cost of hauling the finished product is greater, and (2) the value of the service to the shipper is greater owing to the greater value of the finished product. Formerly the rate per 100 pounds on live stock, and also the proportional rate on dressed meats, from Missouri River points to Chicago was 23.5 cents. The Chicago Great Western several years ago reduced the rate on packing-house products to 18.5 cents, under a contract with the packers on the Missouri River providing that in return it should be given a specified part of their shipments. It made no corresponding reduction in the rate on live stock. For competitive reasons most other roads met the reduction, although some refused to do so.

Packing-house products move in large quantities between the points referred to. But they are very valuable commodities. They move in small carloads, the carload minimum being 20,000 pounds. The risk in handling them is considerable. They are hauled in cars owned by the packers, for which the railways pay mileage which more than covers the investment in the cars and the cost of their maintenance. Chiefly because the cars do belong to the packers they are given expedited movement and are almost invariably unavailable for back-loading; consequently, the rate one way has to cover the cost of hauling the car both ways. For these reasons both the cost and the value of the service of transporting packing-house products are high, and the rates ought to be in proportion—in other words, above the average. The $18\frac{1}{2}$-cent rate was not in proportion to the cost and value of the service. It figures only 7.4 mills per ton per mile, which is substantially less than the average rate per ton per mile in the territory in question and on the roads involved; and, as already remarked, as the packers' private cars usually cannot be used for back-loading, this low rate has to cover the cost of hauling the car both ways.

The Chicago Live Stock Exchange complained in 1904 to the Interstate Commerce Commission that the making of this

rate on packing-house products, while the rate of $23\frac{1}{2}$ cents on live stock was retained, was an unjust discrimination against the traffic in live stock and against the Chicago market. The Commission upheld it, and ordered the roads to "cease and desist from maintaining or enforcing the unlawful relation of rates." The case was appealed, and both the United States Circuit Court and the Supreme Court[1] refused to uphold the Commission, largely on the ground that it was the policy of the government to foster competition and these rates had resulted from that policy. Finally, in the spring of 1911, when the Great Western's contract expired, this road, and all others between the Missouri River cities and Chicago, except the Chicago & Alton, which extends from Kansas City to Chicago, restored the old rate of 23.5 cents. The Wabash, which has lines from Chicago to both Omaha and Kansas City declined to raise the rate from Kansas City because the Alton would not, but acted with the other roads in advancing it from Omaha. The result has been that for a period of several months all the other roads have published a higher rate on packing-house products than the Alton, and the Wabash from Kansas City. Doubtless the managements of these roads believe that the large volume of traffic they obtain by being the only carriers that get this business justifies their stand.

But, what are some of the effects of the application of this unduly low rate? As the Interstate Commerce Commission has held, it involves an unfair discrimination against other commodities on which disproportionately higher rates are charged. For example, the rate from the Missouri River to Chicago on dressed poultry, on which the minimum carload weight is the same, 20,000 pounds, is 45 cents, or 150 per cent higher. The rate on butter and eggs (carload minimum 20,000 pounds) is 45 cents; agricultural implements (carload minimum 20,000 pounds), 30 cents; furniture (carload minimum 20,000 pounds), 30 cents; glucose (carload minimum 40,000 pounds), $23\frac{1}{2}$ cents; hides, dry (carload minimum 20,000 pounds), 35 cents; alcoholic liquors (carload minimum 24,000 pounds), 38 cents; petroleum (carload minimum 26,000 pounds), 22 cents. The rate on packing-house products from

[1] *I.C.C.* v. *C.G.W.*, *et al.*, 209 U.S., 106.

Kansas City to Chicago being less than the rate on live stock tends to cause live stock to be slaughtered in Kansas City in preference to Chicago, and thereby gives the former city an unjust advantage over the latter. The rate from Kansas City being less than from Omaha and St. Joseph puts the shippers of packing-house products at these cities, which are almost exactly the same distance from Chicago as Kansas City, at an undue disadvantage as compared with those at Kansas City, and diverts business to Kansas City, which, under a fair adjustment, would go to Omaha and St. Joseph, thereby harming the latter communities. All the Chicago–Kansas City roads except the Alton are injured because they are compelled to choose whether they will accept an unduly low rate or refuse it and thereby lose their fair share of the traffic.

Under existing law, however, this adjustment of rates cannot be corrected. The condition cannot be remedied by prosecuting any railway for unfair discrimination. While the Alton's rate on dressed meat is very low as compared with its rates on other traffic, a discrimination to come under the ban of the present statutes must involve the charging of relatively disproportionate rates on a "like kind of traffic." The Alton cannot be accused of discriminating unfairly between communities; the only community on the Missouri River to which its rails extend is Kansas City. The only road that really discriminates between communities is the Wabash, which concedes the $18\frac{1}{2}$-cent rate from Kansas City and charges the $23\frac{1}{2}$-cent rate from Omaha. But the Wabash can truly say that the presence of the competition of the Alton at Kansas City, and the absence of any similar competition at Omaha, creates a substantial dissimilarity between the conditions at the two cities; and a discrimination to be unlawful must involve charging disproportionate rates "under substantially similar circumstances and conditions."[1] Even if the Wabash raised the rate from Kansas City the discrimination would continue. The only way equitably to deal with the matter would be to compel the Alton to raise the $18\frac{1}{2}$–cent rate. But, as has been shown, neither the Interstate Commerce Commission nor any other

[1] Sec. 2, Act to Regulate Commerce.

authority can force a railway to raise a rate. Here is an unfair discrimination, which, under existing law, cannot be corrected.

The principal shippers of copper are such large concerns as the Amalgamated Copper Company and the American Smelting & Refining Company. The rates on this commodity are another example of unduly low charges that benefit certain large shippers. It is very valuable, the price at present being 14½ cents per pound. Therefore, a 60,000-pound carload is worth $8,700. On the value-of-the-service principle, for which railway spokesmen always contend, copper should be charged a relatively high rate. The distance from Minnesota Transfer, Minnesota, to New York City is 1,324 miles. The copper rate is 20 cents per 100 pounds, which figures out the very small amount of 3 mills per ton mile. The revenue from a 60,000-pound carload is $120, and the freight charges are 1.38 per cent of the value of the commodity. The distance from Minneapolis to New York City is 1,333 miles. The price of corn at present is 74 cents per bushel. A carload of 60,000 pounds is therefore worth $792. The corn rate is 23½ cents per 100 pounds, or 3.5 mills per ton mile. This yields a revenue of $141 per car load, the freight charges being 17.6 per cent of the value of a carload. Wheat is worth 96 cents per bushel, and therefore a 60,000 pound carload is worth $960. The rate on it is 26 cents per 100 pounds, or 3.9 mills per ton mile, yielding earnings of $156 per car. The freight revenue is 16 per cent of the value of the commodity. Flour is worth $5.20 per barrel. There are 300 barrels in a carload of 60,000 pounds, and its value is $1,560. The rate on it is 25 cents per 100 pounds, which makes 3.8 mills per ton per mile. The earnings per carload are $150, which is 9.6 per cent of the value of the flour.

The distance from Omaha to New York is 1,400 miles. The rate on copper is 20 cents per 100 pounds, or only 2.85 mills per ton per mile. This yields a revenue, on a 60,000-pound carload, of $120 per car. The freight revenue is 1.4 per cent of the value of the commodity. The corn rate is 27 cents per 100 pounds, or 3.85 mills per ton mile, which yields a revenue of $162 per car. This is 20 per cent of the value of the corn. The wheat rate is 28 cents per 100 pounds, or 4 mills per ton per mile. This yields

a revenue of $168 per car, which is 17.2 per cent of the value of the commodity.

The grain rates here quoted are unusually low, and grain rates in general average less than rates on any other commodity moving in large amounts except coal, but these copper rates, in spite of the value of copper, are less than are these unusually low grain rates. It would be hard to find a lower rate on coal than the one of 2.85 mills on copper from Omaha to New York City. These rates on copper were in effect in 1907, when it was worth $22\frac{1}{2}$ cents per pound, or $13,200 per carload.

It may be asked, Who is hurt by such unduly low rates? Railways are entitled to earn a reasonable profit from all of their business; and if a road makes some rates unreasonably low, either (1) it will not earn a fair profit, in which case its stockholders will be injured, and its public service will be impaired, or (2) it will, in order to earn a fair profit, have to impose unnecessarily high rates on other traffic. One result is as undesirable as the other. The difference between the earnings of the railways from the Missouri River to Chicago from an $18\frac{1}{2}$-cent rate on dressed meat and a $23\frac{1}{2}$-cent rate is over $1,000,000 a year. If they are earning fair profits they must be making good that difference either out of their service to the public, or out of their stockholders, or out of other shippers; and if they are not earning fair profits their stockholders or their service, or both, suffer.

I have already shown that it is not only impossible under existing laws to remedy many unfair discriminations resulting from rates already in effect, but also impossible to prevent unfair discriminations from being made by reductions in rates. Let us see to what practical consequence this leads and may lead.

In May, 1911, the Erie and the Delaware & Hudson announced that they proposed to make class rates via the Hudson River, their own rail lines, and the Great Lakes, from New York to Chicago, on the basis of 52 cents per 100 pounds, first class. The standard all-rail first-class rate is 75 cents. The ordinary river-and-rail rate is 62 cents. These figures for the first class indicate how all the rates which the Erie and the Delaware & Hudson proposed to make would have compared with the existing rates. Com-

peting railroads protested violently against the reductions, saying they would compel innumerable other reductions throughout the territory between New York and Chicago. They were supported by the shippers at Boston and other communities on the Atlantic seaboard, who said that the changes proposed would work an unfair discrimination against them, and in favor of New York. The protesting railways and shippers finally appealed to the Interstate Commerce Commission, and the Erie and Delaware & Hudson, under persuasion and pressure from their competitors, receded from their position.

At about the same time the Texas & Pacific initiated reductions in the proportional rates on packing-house products and fresh meats from Fort Worth, Texas, to St. Louis, Missouri, the reduction on fresh meats being from $38\frac{1}{2}$ cents to $35\frac{1}{2}$ cents, and on packing-house products from 33 cents to $32\frac{3}{4}$ cents. There are packing-houses at Oklahoma City which compete with those at Fort Worth; and other interested railways and the competing shippers at Oklahoma City, backed by the Corporation Commission of Oklahoma, complained to the Interstate Commerce Commission against the reductions from Fort Worth, alleging that they would unjustly injure the complaining carriers and work an unfair discrimination against the shippers and community of Oklahoma City. It was in this case that the Interstate Commission held that it can suspend a reduction in rates where such suspension will operate to prevent discrimination. The Commission held, however, that no question of undue discrimination was involved, and refused to issue an order of suspension.

Even if, under a broad construction of the law, the Commission really has authority to suspend a proposed reduction, on no interpretation could it be held that it has authority, after the period for which it can suspend a rate has expired, to forbid a reduction in rates. Therefore, if the rates announced by the Erie and the Delaware & Hudson, or those made by the Texas & Pacific, had been found discriminatory, these roads could, after the expiration of the maximum period of ten months during which the Commission can suspend rates, have applied the rates and effected the discriminations.

One of the most interesting and important traffic situations in the country is that created by the differentials in the rates from Chicago to Boston, New York, Philadelphia, and Baltimore. There used to be the fiercest competition for traffic between the roads leading from Chicago to the various Atlantic seaboard ports, and oftentimes the rates were cut until the carriers hauled many commodities—particularly grain—for almost nothing. This unbridled competition was responsible for several lines being repeatedly thrown into bankruptcy. Under an arrangement entered into in 1877 the rates to Boston and New York were made the same; and the rates to Philadelphia were made two cents, and to Baltimore three cents, per 100 pounds less than to New York and Boston. This and similar agreements were successively broken, abrogated, and renewed, until in 1904 the entire question of the proper differentials to be established was submitted to arbitration by the Interstate Commerce Commission. The Commission, after carefully considering the matter, held that, with a few exceptions which at its suggestion were modified, the existing differentials were fair and reasonable, and they have since been maintained. Assuming that the Commission was right, any change in the differentials would work an unfair discrimination against one or more of the communities concerned. If it were proposed to effect the discrimination by raising the rate to one of the ports, the Commission could prevent it by issuing an order forbidding the proposed advance. On the other hand, if it were proposed to reduce the rate to only one of the ports, the Commission would be helpless to prevent it; and yet obviously this would be just as much in violation of the Commission's arbitration decision, and would work the unfair discrimination just as effectively, as would an advance in rates.

I have already referred to the cases involving rates from the East to points lying between the Missouri River and the Pacific—the so-called "intermountain points," such as Spokane, Wash.; Salt Lake City, Utah; Reno, Nev.; and Phoenix, Ariz. It is well known that these communities long have complained because the railways have made lower rates from the East to the Pacific coast, where they meet ocean competition, than to intermediate points,

where they do not meet such competition. The Interstate Commerce Commission[1] last year issued an order forbidding the roads in future to charge any higher rates from the Missouri River and Twin Cities to intermediate points than to the Pacific coast; or over 7 per cent more from Chicago, or over 15 per cent more from Pittsburgh, or over 25 per cent more from the Atlantic seaboard, to intermediate points than to the coast. The Commerce Court overruled the Commission, holding it could only fix specific reasonable rates, and not differentials. The Commission, as shown in the early part of this article, protests that this ruling leaves it without power to regulate the discriminations between the various communities, because, while it may fix the maximum the roads may charge to the intermediate points, it cannot fix the minimum they may charge to the coast; and it cannot correct or prevent discriminations in rates without being able to fix the relationship that must be established and maintained between them.

The foregoing shows conclusively that existing laws are not adequate to prevent unfair discrimination. Undoubtedly, some of the present discriminations may be remedied by better enforcement of existing laws. The Interstate Commerce Commission and the Department of Justice seem to be doing their best, and with much success, to enforce the laws against rebating in all its forms. Their efforts would be greatly furthered by complete abolition of the control by industrial corporations of all industrial railways which are common carriers; for, as it is only to those that are common carriers that the trunk-line railways can properly pay any switching rates or give any divisions of the through rates, this would preclude the possibility of the public payment of rebates in the form of switching rates, divisions, etc. The commodities clause of the Hepburn act, in substance, prohibits railways from handling in interstate commerce for commercial purposes any commodity owned by them except lumber. The intent and effect are to prohibit railways from owning and operating coal mines and other industries. Are not industrial concerns, by the same provision, equally, in effect, prohibited from hauling their own

[1] *City of Spokane, et al.*, v. *Northern Pacific Railway, et al.; Commercial Club, Traffic Bureau, of Salt Lake City, Utah*, v. *A.,T. & S.F. Ry., et al.*, XXI I.C.C. Rep., 400.

commodities in interstate commerce on their own railways? If not, what is to prevent the railways that control industries from technically passing into the control of their own industries, and thereby completely nullifying the commodities clause? If the commodities clause does apply to cases where railways are owned by industries as well as where industries are owned by railways, why is it not enforced in such cases? If it does not thus apply, then the law should be so amended as to make it thus apply. It is doubtful if the unfair discrimination in favor of large industries will ever be completely stopped so long as big industries, having a large amount of traffic, are allowed to continue to own and operate common carriers by either water or rail.

Legislation of two other kinds also is needed to stop unfair discrimination.

First, there should be legislation modifying the Sherman Anti-Trust law and the pooling provision of the Interstate Commerce act. The past effects of these laws have been harmful. Often they have accomplished the lawmakers' purpose of compelling unrestrained competition in rates. Then they have always caused unfair discrimination. For when railways compete in making rates, they naturally compete harder to get a large amount of traffic than a small amount; and this usually leads to the making of relatively more favorable arrangements or lower rates for the big concerns and the large communities which have a large amount of traffic to give than to the small shippers and the small communities. Legislation for prohibiting competing railways from acting in concert regarding rates and traffic arrangements, such as the Sherman Anti-Trust law and the anti-pooling provision of the Interstate Commerce act, plays directly into the hands of the big shippers who seek unfair discriminations. It helps them to play the railways off against each other by disabling the roads from making a public united stand against improper solicitation and unfair demands; and to this a great deal of existing discrimination is due. In other cases this legislation has had the effect of eliminating, instead of stimulating, competition, because it has sometimes forced on the roads the alternative of mutually cutting each other's throats, or combining and refusing to compete

at all. Whenever possible, they have chosen the latter horn of the dilemma.

European opinion is much more advanced than American opinion regarding the proper attitude of government toward competition between railways. Throughout Europe competing railways, even when some of them are owned by private capitalists and some by the state, are allowed, and even encouraged, to form agreements and pools to mitigate the intensity of competition and prevent the unfair discriminations which inevitably result when competition is carried on without restraint. If we should follow in this country the policy favored by the enlightened economists and public officials of Europe we would so modify the Sherman act as to permit reasonable agreements between competing railways, and also repeal the anti-pooling provision of the Interstate Commerce act.

The argument most commonly and most effectively used against permitting agreements between, and concerted action by, competing railways, in respect to competitive rates, has been that the railways would thus be empowered to form combinations to maintain or to fix rates on an unreasonably high basis. Federal legislation of the last six years has, however, as we have seen, given the Interstate Commerce Commission authority to reduce any unreasonable rate or to prevent any unreasonable advance in rates, whether made or proposed by one railway or by any number of railways. The extent of this power and the use that the Commission may be expected to make of it were illustrated by its decisions in the so-called "rate advance cases." It seems clear that the passage of the Hepburn and the Mann-Elkins acts have destroyed the last vestige of reason in the arguments against authorizing the railways to make traffic agreements and even traffic pools; and I doubt if most people realize how helpless, under existing conditions and laws, the largest railway is in dealing with certain large shippers. The steel-makers, for example, can, and, it is understood, do to some extent, pool the orders for rails placed with them by the railways. On the other hand, the railways cannot pool the traffic given to them by the steel-makers. In consequence, one or more of the steel-makers can, if they wish, withdraw their

traffic from any road that they please, can concentrate it on any other road they please, and can thereby practically dictate to each road both where it must buy its rails and what divisions of the through rates on the steel mills' traffic the trunk lines must give to the railways controlled by the steel companies. Is it not the height of absurdity and inconsistency that the people of the United States should deliberately make and keep in effect laws which thus, to a large extent, put the railways at the mercy of big shippers, and then when, largely owing to this, unfair discrimination results, denounce and prosecute the managers of the railways for it?

Secondly, the Interstate Commerce Commission ought to be given as great authority over rates that are unreasonable or unfairly discriminatory because too low as it now has over rates that are unreasonable or unfairly discriminatory because too high. Few students of the subject believe that on the average the rates of the railways of the United States are excessive. If it be conceded that on the average they are not excessive, it must follow that fairness to the railways requires that, when rates are to be changed in order to correct discriminations, they shall be reduced in some instances and raised in others, according to circumstances. Altogether aside from this point, there are many cases, as I have shown, where, as the law now stands, the Commission cannot correct or prevent discriminations which one or more railways may be disposed to perpetuate. There are two ways in which the needed additional power might be given the Commission. It might be empowered—after a proper hearing in each case, of course—to fix, not merely *maximum* rates, but the *exact* rates that must be charged, whether higher or lower than those in effect. In some of the states, such as Texas, the state commissions now fix specific rates. This would give the Interstate Commerce Commission ample power to control discriminations. It may be that, instead of authorizing the Commission to fix the exact rates to be charged, it should be empowered to fix only maximum and minimum rates, the railways being left free to adjust the tariffs between these superior and inferior limits. This would have the advantage of leaving the traffic managers more discretion to adapt charges to fluctuating conditions.

The public is apt at first to regard with disfavor any measure which would sometimes prevent reductions or cause advances in rates. But when it is clearly perceived that the purpose and effect of making rates that are unduly low do not differ from the purpose and effect of giving rebates, and that owing in no small measure to the close relations between, or the actual identity of, the controlling factors in numerous great industrial corporations and railways, the exercise of more authority by the Commission over rates is necessary adequately to protect small shippers, many railway stockholders, and the public generally, it ought not to be impracticable to get legislation giving the Commission, in addition to its present authority to fix maximum rates, the power, and the corresponding duty, of compelling advances and forbidding reductions whenever this is necessary to prevent unfair discrimination in any form.

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